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No. 939

In the

Supreme Court of the United States

OCTOBER TERM, 1966

HANK AVERY,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, et al.,

Respondents.

REPLY OF THE RESPONDENTS J. C. BROOKS, CLARK MORELAND AND LOUIS OSBORNE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

To the Honorable Justices of the Supreme Court of the United States:

Alvey A. Bryant, Clark Moreland and Louis Osborne were Respondents in this cause in the Supreme Court of Texas, and at that time were the incumbent County Commissioners

of Precincts 2, 3, and 4, respectively, of Midland County, Texas. Since the final judgment in the Supreme Court of Texas, and prior to the filing of the Petition for Writ of Certiorari in this Court, the term of office of the Respondent Alvey A. Bryant has expired, and J. C. Brooks is the presently incumbent Commissioner from Precint No. 2, Midland County, Texas, and he joins in this Reply to said Petition.

GROUNDS FOR OPPOSITION OF THE PETITION

A. The Petition fails to state a substantial Federal question because the arrangements made by the State of Texas as to the composition and control of its local subdivisions and municipal corporations do not infringe any rights guaranteed to Petitioner by the United States Constitution.

Over many years, and in various aspects and in different contexts, parties have come before this Court complaining of actions of States with reference to their local subdivisions, governmental units, districts or municipalities as infringing the parties' rights under the United States Constitution. *Soliah v. Heskin*, 222 U.S. 522, 32 Sup. Ct. 103; *Board of Laramie v. Board of Albany*, 92 U.S. 307, 23 Law Ed. 552; *Mobile County v. Kimbell*, 102 U.S. 691, 26 Law Ed. 238; *Hunter v. Pittsburgh*, 206 U.S. 161, 28 Sup. Ct. 40; *Higginbotham v. Baton Rouge*, 306 U.S. 535, 59 Sup. Ct. 705; *Minor v. Happerset*, 21 Wall 162, 22 Law Ed. 627; *Mason v. Missouri*, 179 U.S. 328, 21 Sup. Ct. 125; and *Breedlove v. Settles*, 302 U.S. 277, 50 Sup. Ct. 205.

The principle to be derived and distilled from these prior decisions of this Court is that, in our Federal system, the States have absolute control over their political subdivisions, local governmental units, and municipal corporations, and of the officials who serve in such units. Without any restraints imposed by the United States Constitution, the States may, through their various governmental processes, create as many or as few subdivisions and municipalities as they please, and may create such subdivisions of whatever size or shape, and may delegate to them such of the state power as the individual States may deem appropriate. Under these decisions, the States may create, abolish, or merge such subdivisions and municipalities at will, may provide for their administration by any type of officials, and may provide the selection of such officials by appointment, or election, or may abolish the offices altogether.

Consistent with these decisions, this Court has in recent years twice refused to entertain, because they did not raise a substantial Federal question, appeals complaining of a disparity of population or voting strength as between the precincts, wards, or other areas from which the officials are chosen to administer the affairs of local governmental subdivisions or municipalities. *Tedesco v. Board of Supervisors*, 339 U.S. 940, 70 Sup. Ct. 797; *Glass v. Hancock County Election Commission*, 378 U.S. 558, 84 Sup. Ct. 1910, 12 Law Ed. 2d 1035.

The decision of the Supreme Court in Texas in this case is consistent with and follows the prior rulings of this Court

and does not infringe or deny any of Petitioner's Federally guaranteed Constitutional rights.

B. The Petition fails to state a substantial Federal question because the opinion and decision of the Supreme Court of Texas leaves Petitioner free to assert his claim in the State Courts under State Law.

The gravamen of Petitioner's complaint is that the County Commissioners' Redistricting Order of August 31, 1963, provides for, or permits, unlawful domination of the government of Midland County, Texas, by a small minority of rural voters. The "QUESTION PRESENTED" on page 3 of the Petition does not even attempt to pose a case of infringement of Petitioner's personal rights guaranteed to him under the United States Constitution, but, instead, calls into question generally whether the population disparity is an unlawful distribution of power under the United States Constitution in the county government. The same question arises under the State Constitution, and the Supreme Court of Texas has already determined that question in Petitioner's favor, or at least in a way which permits him hereafter to pursue further in the State Courts under State law the question of the distribution of governmental powers in Midland County, Texas. Since the redistricting order has been held to violate the Texas Constitution, the Federal question is not reached.

The decision and mandate of the Supreme Court of Texas is that the cause be "reversed and remanded to the District Court for further proceedings in accordance with this opinion". Under the State practice, this amounts to a gen-

eral remand, reopening the cause in the State District Court for a new trial on all issues. *Rule 503*; Texas Rules of Civil Procedure; *First State Bank of Bishop v. Grebe*, 162 S.W. 2d 165 (err. ref. w.o.m., 1942); *Seydler v. Krueger*, 133 S.W. 2d 189 (err. ref., 1939).

Petitioner's complaint, as stated under "QUESTION PRESENTED", is that the Redistricting Order of August 31, 1963, creates an unlawful distribution of power within the government of Midland County, Texas. The Supreme Court of Texas has agreed with Petitioner and held that it does, basing its holding on the Constitution of the State of Texas, Article V, Section 18. The Supreme Court of Texas has remanded the cause for further proceedings in the State Courts, in which Petitioner will be left free to assert his contentions and possibly bring to an end the rural domination of which he complains without creating *equally populated* Commissioners Precincts, and thus without ever reaching any Federal constitutional question of "one man—one vote."

Since the case has been decided under State law in a way which permits Petitioner to seek further relief under State law without reaching any Federal question, the Petition fails to state a substantial Federal question and should be dismissed. *Henry v. Mississippi*, 379 U.S. 443; 85 Sup. Ct. 564; 13 Law Ed. 2d 408; *Wolfe v. North Carolina*, 364 U.S. 177; 80 Sup. Ct. 1482; 4 Law Ed. 2d 1650.

The above noted difference in the handling of the case by the Supreme Court of Texas distinguishes this Petition

from the appeals entertained by this Court on December 5, 1966, in No. 430, *Sailors v. Board of Education of Kent County;* No. 491, *Board of Supervisors of Suffolk County v. Bianchi;* and No. 624, *Moody v. Flowers.* In none of those cases were the appealing parties afforded an opportunity to seek redress of their grievance in further proceedings in the State Court under State law. In this case Petitioner has been afforded such opportunity, for which reason the action of this Court in entertaining the above mentioned appeals is not a precedent or basis for granting the writ in this case.

PREMISES CONSIDERED, Respondents pray that the Petition be in all things denied.

Respectfully submitted,

Frank Stubbeman

Frank Stubbeman

F. H. Pannill

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W. B. Browder Jr

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing reply has been served on Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

William A. Olson
City Attorney
City Hall
Houston, Texas

Dated this ..... day of January, 1967.

F. H. Pannill

F. H. Pannill